DECEMBER 2002

MJI Publications Updates

Child Protective Proceedings Benchbook

Contempt of Court Benchbook (Revised Edition)

Crime Victim Rights Manual

Criminal Procedure Monograph 6—Pretrial Motions

Domestic Violence Benchbook, 2d Edition

Friend of the Court Domestic Violence Resource Book

Sexual Assault Benchbook

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Update: Child Protective Proceedings Benchbook

CHAPTER 9

Pretrial Proceedings

9.12 Required Procedures for Establishing Paternity

A. Definition of "Father"

Insert the following case summary after the first bullet on p 9-10

In re CAW, ___ Mich App ___ (2002) involved a married couple, Deborah Weber and Robert Rivard, and their children. One of the children, CAW, was conceived and born during the marriage, but the identity of CAW's natural father was unknown. Both Weber and Rivard testified that CAW may not be the biological child of Rivard and that a man outside of the marriage, the appellant, may be CAW's father. After the parental rights of both Weber and Rivard were terminated, appellant filed a motion to intervene based upon his belief that he was CAW's biological father. The trial court denied the motion indicating that appellant had no standing to intervene.

The Court of Appeals held that although appellant would not have standing to pursue paternity under the Paternity Act, MCL 722.714 et seq., he did have standing to seek to establish paternity during the pendency of a child protective proceeding, pursuant to MCR 5.903(A)(1). The Court stated:

> "The definition of 'child born out of wedlock' in MCR 5.903(A)(1) is less restrictive than that under the Paternity Act or the probate code. Our courts have established that under the Paternity Act, there must have been a prior determination that a child was not the issue of a marriage for a putative father to have standing to establish paternity. *Girard* [*v Wagenmaker*, 437 Mich 231, 242-243 (1991)]. However, MCR 5.903(A)(1) uses the language, 'a child

> determined by judicial notice or otherwise.' Although the difference is subtle, we find it distinct. MCR 5.921 allows the court to determine the identity of a putative father during the pendency of a protective proceeding if the court *at any time during the pendency* of the proceedings determines that the child has no father as defined by the court rules. Reading MCR 5.921 in conjunction with MCR 5.903 under the authority of *Montgomery, supra*, we find that during child protective proceedings, the court can determine the child to be born out of wedlock and then take appropriate steps to determine the identity and rights of the biological father."

The Court of Appeals reversed the trial court, concluding that appellant has standing to intervene in this case and should be given the opportunity to establish his paternity. *Id*. at ___. However, the Court cautioned "this should not be interpreted to mean that appellant is entitled to any rights over the child. We find only that appellant should be given the opportunity to establish his paternity. If appellant establishes that he is the child's biological father, his fitness must then be tested." *Id*. at ___.

December 2002

Update: Contempt of Court Benchbook (Revised Edition)

CHAPTER 5

Common Forms of Contempt of Court

5.10 Violation of Parenting Time Orders in Divorce Judgments

Effective December 1, 2002, 2002 PA 568 amended numerous provisions of the Support and Parenting Time Enforcement Act, including MCL 552.641. Accordingly, the following language should replace the discussion of MCL 552.641 contained on pp 60–61:

> The Support and Parenting Time Enforcement Act, MCL 552.641(1), requires the Friend of the Court, for a "friend of the court case,"* to take one or more of the following actions on an alleged custody or parenting time order violation:

*See 2002 PA 571, specifically, MCL 552.602(m), for the definition of "friend of the court case."

- Apply a makeup parenting time policy under MCL 552.642.
- Commence civil contempt proceedings under MCL 552.644. If a parent fails to appear in response to an order to show cause, the court may issue a bench warrant, and, except for good cause shown on the record, shall order the parent to pay the costs of the hearing, the issuance of the warrant, the arrest, and further hearings. MCL 552.644(5).
- File a motion pursuant to MCL 552.517d for a modification of the existing parenting time provisions to ensure parenting time, unless it would be contrary to the best interests of the child.
- Schedule mediation pursuant to MCL 552.13.
- Schedule a joint meeting under MCL 552.542a.

> MCL 552.641(2) permits the Friend of the Court to decline to take one of the foregoing actions if any of the following circumstances apply:

> "(a) The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because the complaint was found to be unwarranted, and the party has not paid those costs.
>
> "(b) The alleged custody or parenting time order violation occurred more than 56 days before the complaint is submitted.
>
> "(c) The custody or parenting time order does not include an enforceable provision that is relevant to the custody or parenting time order violation alleged in the complaint."

If the court finds that a parent has violated a custody or parenting time order without good cause,* the court must find that parent in contempt. MCL 552.644(2). MCL 552.644(2)(a)–(h) provide that once the court finds a parent in contempt, it may do one or more of the following:

*"Good cause" includes, but is not limited to, consideration of the safety of a child or a party who is governed by the parenting time order. MCL 552.644(3).

> "(a) Require additional terms and conditions consistent with the court's parenting time order.
>
> "(b) After notice to both parties and a hearing, if requested by a party, on a proposed modification of parenting time, modify the parenting time order to meet the best interests of the child.
>
> "(c) Order that makeup parenting time be provided for the wrongfully denied parent to take the place of wrongfully denied parenting time.
>
> "(d) Order the parent to pay a fine of not more than $100.00.
>
> "(e) Commit the parent to the county jail.
>
> "(f) Commit the parent to the county jail with the privilege of leaving the jail during the hours the court determines necessary, and under the supervision the court considers necessary, for the purpose of allowing the parent to go to and return from his or her place of employment.
>
> "(g) If the parent holds an occupational license, driver's license, or recreational or sporting license, condition the suspension of the license, or any combination of the licenses, upon noncompliance with an order for makeup and ongoing parenting time.

> "(h) If available within the court's jurisdiction, order the parent to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

The court must state on the record the reason it is not ordering a sanction listed in MCL 522.644(2)(a)–(h). MCL 552.644(3).

If the court finds a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction and to pay the other party's costs. MCL 552.644(6) and MCL 552.644(7). The first time a party acts in bad faith the sanction may not exceed $250.00. The second time a party acts in bad faith the sanction may not exceed $500.00. Sanctions for any third or subsequent finding that a party has acted in bad faith may not exceed $1,000.00. MCL 552.644(6).

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Update: Crime Victim Rights Manual

CHAPTER 8

The Crime Victim at Trial

8.11 Admissible Hearsay Statements by Crime Victims

A. "Present Sense Impressions"

Insert the following language at the end of Section 8.11(A):

> See also *People v Bowman*, ___ Mich App ___ (2002), where, in a murder case, the Court of Appeals found no abuse of discretion by the trial court in declining under MRE 803(1) to admit testimony that the victim was "upset" after driving from a meeting with a fellow drug dealer to the home of a friend. Although the Court of Appeals acknowledged that it is "not overly literal" in construing MRE 803(1)'s "immediately thereafter" requirement, and that a statement may qualify under this phrase even when made several minutes after the observed event, the Court found that the statement "was not made merely a few minutes after the conversation . . . but following a drive of an indeterminate length from one house to another, and then in a separate conversation with someone not present during the first conversation." *Id*. at ___. To conclude that this was a "present sense impression," the Court stated, would be to "rob the phrase of its meaning . . . ." Stating that it "will not interpret the language of this evidentiary rule in a sense so contrary to its 'fair and natural import,'" the Court found no abuse of discretion by the trial court in declining to admit such an account. *Id*. at ___.

CHAPTER 10

Restitution

10.2 Statutory Authority for Ordering Restitution

Insert the following language at the bottom of p 235:

> A restitution order is governed by the statute in effect at the time of sentencing, not at the time of the offense. In *People v Lueth*, ___ Mich App ___ (2002), the Court of Appeals held that the trial court did not err by retrospectively applying an amended version of MCL 780.767(1), which was in effect at the time of sentencing but not at "the time of at least some of the crimes." The Court concluded that the amended statute, which deleted the requirement that a court consider a defendant's ability to pay before assessing the amount of restitution, could be applied retrospectively, since it "operate[d] in furtherance of a remedy already existing." *Id*. at ___. The Court found its holding to be "in accord with previous cases from this Court and our Supreme Court recognizing that a restitution order is governed by the statute in effect at the time of sentencing." *Id*. Finally, the Court rejected defendant's argument that the amended restitution statute violated the Ex Post Facto Clause of the Michigan Constitution, Const 1963, art 1, § 10, since the "amended language did not add an obligation to defendant's burden but instead removed consideration of what may have been used to reduce defendant's punishment." *Id*.

CHAPTER 12

The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

12.6 The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Insert the following language at the end of Section 12.6:

> The Michigan Supreme Court has held that the holding in *Wheelock v Eyl*, 393 Mich 74, 79 (1974), did not survive the adoption of the Rules of Evidence, and thus admission of evidence of a criminal conviction in a subsequent civil suit is governed by the Rules of Evidence, specifically MRE 401-403.
>
> In *Waknin v Chamberlain*, ___ Mich ___ (2002), the plaintiff brought a civil action against defendant for assault and battery. This action was based in part on a series of assaults that allegedly occurred in July 1995, and in part on an assault and battery that allegedly occurred on May 6, 1996. This last alleged assault formed the basis of defendant's previous conviction for assault and battery. In the civil suit, defendant moved to exclude evidence of this conviction. The trial court, relying on the holding in *Wheelock*, *supra*, which provides that "a criminal conviction after trial, or plea, or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence," granted defendant's motion to exclude the evidence of his prior conviction. After the jury returned a verdict of no cause of action, the trial court denied plaintiff's motion for a new trial, concluding that evidence of the conviction was inadmissible not only under *Wheelock* but also under MRE 403 since the admission of such a conviction would have been more prejudicial than probative. The Court of Appeals, relying on MRE 403, affirmed.
>
> The Supreme Court began by noting that *Wheelock* was decided before the adoption of the Michigan Rules of Evidence. The Supreme Court concluded "that the rule in *Wheelock*, at least as it pertains to the use of a conviction in a subsequent civil case, did not survive their adoption." *Id*. at ___. After reviewing the applicable rules of evidence regarding relevancy, probative value, and prejudicial effect, the Court found that defendant's conviction was relevant under MRE 401 since "the fact that defendant had been convicted of assault and battery for the same conduct that plaintiff is now seeking civil damages for certainly 'would have a tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.'" *Id*. at ___. Further, the Supreme Court found that the

probative value of the conviction under MRE 403 was not substantially outweighed by the danger of unfair prejudice. In doing so, the Supreme Court, with an emphasis on MRE 403's requirement of "*unfair* prejudice," held as follows:

> "Although we agree with the lower courts that the admission of defendant's conviction would be prejudicial, we do not agree that this prejudicial effect would be *unfair*.
>
> "Defendant's conviction is not merely marginally probative evidence, and thus there is no danger that marginally probative evidence will be given undue weight by the jury. Rather, that defendant was found guilty beyond a reasonable doubt—a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case—is highly probative evidence. Where a civil case arises from the same incident that resulted in a criminal conviction, the admission of evidence of the criminal conviction during the civil case is prejudicial for precisely the same reason it is probative. That fact does not, without more, render admission of evidence of a criminal conviction *unfair*, i.e., substantially more prejudicial than probative. Defendant had an opportunity and an incentive to defend himself in the criminal proceeding. For these reasons, we conclude that the trial court abused its discretion in precluding evidence of defendant's conviction on the basis that its probative value was substantially outweighed by the danger of unfair prejudice." *Id*. at ___. [Emphasis in original.]

Regarding the issue of whether no contest pleas should be treated similarly, the Court stated: "We express no opinion regarding whether pleas of nolo contendre are admissible as substantive evidence in subsequent civil proceedings." *Id*.

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Update: Criminal Procedure Monograph 6—Pretrial Motions

Part 2—Individual Motions

6.20 Motion for Substitution of Counsel for Defendant or Motion to Withdraw as Counsel for Defendant

Insert the following language at the end of the first full paragraph in the "Discussion" subsection:

> A defendant's allegations that counsel did not see things defendant's way and did not pursue futile motions or meaningless discovery does not establish good cause for substitution of counsel. See *People v Russell*, ___ Mich App ___ (2002) (matters of general legal expertise and strategy fall within the sphere of counsel's professional judgment).

December 2002

Update: Domestic Violence Benchbook (2nd ed)

CHAPTER 6

Issuing Personal Protection Orders—Statutory Overview

6.7 Motion to Modify, Terminate, or Extend a PPO

Insert the following language as new subsection (C) on p 233:

C. Burden of Proof

In *Pickering v Pickering*, ___ Mich App, ___, (2002), the Court of Appeals held that the burden of justifying the continuation of an ex parte PPO is on the petitioner. The court indicated that because the PPO statute and court rules governing motions to rescind or terminate PPOs are silent as to the burden of proof, MCR 3.310(B)(5) is controlling.

MCR 3.310(B)(5) provides, in part:

> ". . . At a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause."

In *Pickering*, the Court of Appeals indicated that the burden of proof has two aspects: the "burden of persuasion" and the "burden of going forward with evidence." *Id at* ___. In the context of a PPO granted ex parte, the "burden of persuasion" is the burden of justifying the continuation of the PPO. The "burden of persuasion" requires the petitioner to demonstrate that the PPO should continue because it is "just, right or reasonable." *Id.* at ___. Regarding the "burden of going forward with the evidence," the Court held that although it would "not offend MCR 3.310(B)(5) by placing the burden of first coming forward with evidence on

defendant, we believe it would be more appropriate in these hearings to have the petitioner—who has the burden of justification throughout the proceedings—to also be the party to first come forward with evidence." *Id.* at ___ n 1.

Chapter 12

Domestic Violence and Access to Children

12.9 Civil Remedies to Enforce Michigan Parenting Time Orders

Effective December 1, 2002, 2002 PA 569 amended numerous provisions of the laws relating to the Friend of the Court. It also added MCL 552.511b, which provides for the enforcement of support and parenting time orders. Accordingly, the following language should be inserted in Section 12.9 following the first paragraph.

> The Friend of the Court office must initiate enforcement of a custody or parenting time violation upon receipt of a written complaint stating specific facts that constitute a violation of a custody or parenting time order. MCL 552.511b(1). If a parent has the right to interact with his or her child pursuant to a custody or parenting time order and requests assistance, the Friend of the Court must provide assistance. MCL 552.511b(1).
>
> Within 14 days of the receipt of the complaint, the Friend of the Court must send a copy of the complaint to the individual accused of interfering with the order and to each party to the custody or parenting time order. MCL 552.511b(2).
>
> MCL 552.511b(3) provides:
>
> > "If, in the opinion of the office, the facts as stated in the complaint allege a custody or parenting time order violation that can be addressed by taking an action authorized under section 41 of the support and parenting time enforcement act, MCL 552.641, the office shall proceed under section 41 of the support and parenting time enforcement act, MCL 552.641."

Effective December 1, 2002, 2002 PA 568 amended numerous provisions of the Support and Parenting Time Enforcement Act, specifically MCL 552.641(1). Accordingly, the following language should replace the discussion of MCL 552.641(1) contained on pp 442–43:

> The Support and Parenting Time Enforcement Act, MCL 552.641(1), requires the Friend of the Court, for a "friend of the court case,"* to take one or more of the following actions on an alleged custody or parenting time order violation:
>
> **F** Apply a makeup parenting time policy under MCL 552.642.

*See 2002 PA 571, specifically, MCL 552.602(m), for the definition of "friend of the court case."

- Commence civil contempt proceedings under MCL 552.644. If a parent fails to appear in response to an order to show cause, the court may issue a bench warrant, and, except for good cause shown on the record, shall order the parent to pay the costs of the hearing, the issuance of the warrant, the arrest, and further hearings. MCL 552.644(5).

- File a motion pursuant to MCL 552.517d for a modification of the existing parenting time provisions to ensure parenting time, unless it would be contrary to the best interests of the child.

- Schedule mediation pursuant to MCL 552.13.

- Schedule a joint meeting under MCL 552.542a.

MCL 552.641(2) permits the Friend of the Court to decline to take one of the foregoing actions if any of the following circumstances apply:

> "(a) The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because the complaint was found to be unwarranted, and the party has not paid those costs.
>
> "(b) The alleged custody or parenting time order violation occurred more than 56 days before the complaint is submitted.
>
> "(c) The custody or parenting time order does not include an enforceable provision that is relevant to the custody or parenting time order violation alleged in the complaint."

If the court finds that a parent has violated a custody or parenting time order without good cause,* the court must find that parent in contempt. MCL 552.644(2). MCL 552.644(2)(a)–(h) provide that once the court finds a parent in contempt, it may do one or more of the following:

*"Good cause" includes, but is not limited to, consideration of the safety of a child or a party who is governed by the parenting time order. MCL 552.644(3).

> "(a) Require additional terms and conditions consistent with the court's parenting time order.
>
> "(b) After notice to both parties and a hearing, if requested by a party, on a proposed modification of parenting time, modify the parenting time order to meet the best interests of the child.

> "(c) Order that makeup parenting time be provided for the wrongfully denied parent to take the place of wrongfully denied parenting time.
>
> "(d) Order the parent to pay a fine of not more than $100.00.
>
> "(e) Commit the parent to the county jail.
>
> "(f) Commit the parent to the county jail with the privilege of leaving the jail during the hours the court determines necessary, and under the supervision the court considers necessary, for the purpose of allowing the parent to go to and return from his or her place of employment.
>
> "(g) If the parent holds an occupational license, driver's license, or recreational or sporting license, condition the suspension of the license, or any combination of the licenses, upon noncompliance with an order for makeup and ongoing parenting time.
>
> "(h) If available within the court's jurisdiction, order the parent to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

The court must state on the record the reason it is not ordering a sanction listed in MCL 522.644(2)(a)–(h). MCL 552.644(3).

If the court finds a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction and to pay the other party's costs. MCL 552.644(6) and MCL 552.644(7). The first time a party acts in bad faith the sanction may not exceed $250.00. The second time a party acts in bad faith the sanction may not exceed $500.00. Sanctions for any third or subsequent finding that a party has acted in bad faith may not exceed $1,000.00. MCL 552.644(6).

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Update: Friend of the Court Domestic Violence Resource Book

CHAPTER 4

Custody and Parenting Time

4.10 Civil Remedies to Enforce Parenting Time Orders

Effective December 1, 2002, 2002 PA 569 amended numerous provisions of the laws relating to the Friend of the Court. It also added MCL 552.511b, which provides for the enforcement of support and parenting time orders. Accordingly, the following language should be inserted in Section 4.10 following the first paragraph:

> The Friend of the Court office must initiate enforcement of a custody or parenting time violation upon receipt of a written complaint stating specific facts that constitute a violation of a custody or parenting time order. MCL 552.511b(1). If a parent has the right to interact with his or her child pursuant to a custody or parenting time order and requests assistance, the Friend of the Court must provide assistance. MCL 552.511b(1).
>
> Within 14 days of the receipt of the complaint, the Friend of the Court must send a copy of the complaint to the individual accused of interfering with the order and to each party to the custody or parenting time order. MCL 552.511b(2).
>
> MCL 552.511b(3) provides:
>
> > "If, in the opinion of the office, the facts as stated in the complaint allege a custody or parenting time order violation that can be addressed by taking an action authorized under section 41 of the support and parenting time enforcement act, MCL 552.641, the office shall proceed under section 41 of the support and parenting time enforcement act, MCL 552.641."

Effective December 1, 2002, 2002 PA 568 amended numerous provisions of the Support and Parenting Time Enforcement Act, specifically MCL

552.641(1). Accordingly, the following language should replace the discussion of MCL 552.641(1) contained on pp 124–25:

*See 2002 PA 571, specifically, MCL 552.602(m), for the definition of "friend of the court case."

> The Support and Parenting Time Enforcement Act, MCL 552.641(1), requires the Friend of the Court, for a "friend of the court case,"* to take one or more of the following actions on an alleged custody or parenting time order violation:

- **F** Apply a makeup parenting time policy under MCL 552.642.
- **F** Commence civil contempt proceedings under MCL 552.644. If a parent fails to appear in response to an order to show cause, the court may issue a bench warrant, and, except for good cause shown on the record, shall order the parent to pay the costs of the hearing, the issuance of the warrant, the arrest, and further hearings. MCL 552.644(5).
- **F** File a motion pursuant to MCL 552.517d for a modification of the existing parenting time provisions to ensure parenting time, unless it would be contrary to the best interests of the child.
- **F** Schedule mediation pursuant to MCL 552.13.
- **F** Schedule a joint meeting under MCL 552.542a.

> MCL 552.641(2) permits the Friend of the Court to decline to take one of the foregoing actions if any of the following circumstances apply:
>
> > "(a) The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because the complaint was found to be unwarranted, and the party has not paid those costs.
> >
> > "(b) The alleged custody or parenting time order violation occurred more than 56 days before the complaint is submitted.
> >
> > "(c) The custody or parenting time order does not include an enforceable provision that is relevant to the custody or parenting time order violation alleged in the complaint."

If the court finds that a parent has violated a custody or parenting time order without good cause,* the court must find that parent in contempt. MCL 552.644(2). MCL 552.644(2)(a)–(h) provide that once the court finds a parent in contempt, it may do one or more of the following:

> "(a) Require additional terms and conditions consistent with the court's parenting time order.
>
> "(b) After notice to both parties and a hearing, if requested by a party, on a proposed modification of parenting time, modify the parenting time order to meet the best interests of the child.
>
> "(c) Order that makeup parenting time be provided for the wrongfully denied parent to take the place of wrongfully denied parenting time.
>
> "(d) Order the parent to pay a fine of not more than $100.00.
>
> "(e) Commit the parent to the county jail.
>
> "(f) Commit the parent to the county jail with the privilege of leaving the jail during the hours the court determines necessary, and under the supervision the court considers necessary, for the purpose of allowing the parent to go to and return from his or her place of employment.
>
> "(g) If the parent holds an occupational license, driver's license, or recreational or sporting license, condition the suspension of the license, or any combination of the licenses, upon noncompliance with an order for makeup and ongoing parenting time.
>
> "(h) If available within the court's jurisdiction, order the parent to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

The court must state on the record the reason it is not ordering a sanction listed in MCL 522.644(2)(a)–(h). MCL 552.644(3).

If the court finds a party to a parenting time dispute has acted in bad faith, the court must order the party to pay a sanction and to pay the other party's costs. MCL 552.644(6) and MCL 552.644(7). The first time a party acts in bad faith the sanction may not exceed $250.00. The second time a party acts in bad faith the sanction may not exceed $500.00. Sanctions for any third or

*"Good cause" includes, but is not limited to, consideration of the safety of a child or a party who is governed by the parenting time order. MCL 552.644(3).

subsequent finding that a party has acted in bad faith may not exceed $1,000.00. MCL 552.644(6).

CHAPTER 7

Personal Protection Orders

7.5 Motion to Modify or Rescind a PPO

Insert the following at the bottom of page 187:

F Burden of Proof

In *Pickering v Pickering*, ___ Mich App, ___, (2002), the Court of Appeals held that the burden of justifying the continuation of an ex parte PPO is on the petitioner. The court indicated that because the PPO statute and court rules governing motions to rescind or terminate PPOs are silent as to the burden of proof, MCR 3.310(B)(5) is controlling.

MCR 3.310(B)(5) provides, in part:

> ". . . At a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause."

In *Pickering*, the Court of Appeals indicated that the burden of proof has two aspects: the "burden of persuasion" and the "burden of going forward with evidence." *Id at* ___. In the context of a PPO granted ex parte, the "burden of persuasion" is the burden of justifying the continuation of the PPO. The "burden of persuasion" requires the petitioner to demonstrate that the PPO should continue because it is "just, right or reasonable." *Id.* at ___. Regarding the "burden of going forward with the evidence," the Court held that although it would "not offend MCR 3.310(B)(5) by placing the burden of first coming forward with evidence on defendant, we believe it would be more appropriate in these hearings to have the petitioner—who has the burden of justification throughout the proceedings—to also be the party to first come forward with evidence." *Id*. at ___ n 1.

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Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.22 Malicious Use of Phone Service

Insert the following language at the end of the Note at the top of p 174, before subsection (A):

> Additionally, the Court of Appeals has struck down as unconstitutionally vague (as applied to defendant) a local ordinance prohibiting persons from engaging in "any indecent, insulting, immoral or obscene conduct in any public place." In *People v Barton*, ___ Mich App ___ (2002), the defendant was convicted under the "insulting" term of the ordinance for referring to fellow restaurant patrons as "spics." The Court of Appeals, in reversing defendant's conviction, explained its rationale as follows:
>
> > "Defendant was charged under the 'insulting' term of the ordinance. Even if the limiting construction of the ordinance remedied its failure to provide sufficient standards to determine whether a crime had been committed, the construction did not rehabilitate the ordinance with regard to its failure to provide fair notice to defendant of the conduct proscribed. Here, as noted by the *Boomer* Court, '[a]llowing a prosecution where one utters "insulting" language could possibly subject a vast percentage of the populace to a misdemeanor conviction.' Boomer, supra at 540. The term 'insulting' with regard to prohibited conduct did not give adequate forewarning that the challenged conduct—referencing a person by a racial slur—may rise to the level of constitutionally proscribable 'fighting words' conduct. In effect, without fair warning,

defendant was charged with, and convicted for, conduct that she could not reasonably have known was criminal."

CHAPTER 6

Specialized Procedures Governing Preliminary Examinations and Trials

6.8 Defendant's Right of Self-Representation and Cross-Examination of Sexual Assault Victims

Insert the following language after the first full paragraph on p 306:

In *People v Russell*, ___ Mich App ___ (2002), the Court of Appeals found that a defendant may implicitly make a choice of self-representation by repeatedly rejecting representation of court-appointed counsel in the face of numerous warnings and advice to the contrary. In *Russell*, the trial court permitted defendant's first appointed counsel to withdraw after defendant complained of his representation. Afterward, the trial court appointed another attorney. On the first day of trial, the defendant, because of an expressed dissatisfaction with appointed counsel, and also because of an alleged "personality conflict," requested appointment of substitute counsel, which was denied by the trial court. Defendant thereafter repeatedly rejected representation by his court-appointed counsel but said he wanted to be represented by counsel. After being thoroughly advised of the risks of self-representation, the trial court concluded that defendant had knowingly, intelligently, and voluntarily waived his right to representation.

The Court of Appeals found that the trial court did not abuse its discretion in denying defendant's request for substitute counsel, or in permitting defendant to proceed in propria persona. To support its decision on permitting defendant's self-representation, the Court of Appeals stated:

> "The record here demonstrates that defendant was thoroughly advised of the risks of self-representation and was repeatedly advised that if he chose to reject court-appointed counsel, his options were self-representation or to retain counsel. Defendant made his unequivocal choice, not by explicitly demanding to represent himself, but implicitly by repeatedly rejecting representation by court-appointed counsel in the face of numerous warnings and advice to the contrary. Thus, by his own conduct defendant demonstrated his unequivocal choice to proceed in propria persona. Defendant confirmed this choice again after jury selection when he again asserted he did not want [his second court-appointed counsel] to participate in the trial."

Relying on *Anderson*, *supra* at 370, the Court held that under the totality of the circumstances, the defendant "knowingly, intelligently and voluntarily waived his right to counsel [and was] aware of the dangers of self-representation." *Russell*, *supra* at ___.

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

B. Present Sense Impression Exception—MRE 803(1)

Insert the following language at the end of Section 7.4(B):

> See also *People v Bowman*, ___ Mich App ___ (2002), where, in a murder case, the Court of Appeals found no abuse of discretion by the trial court in declining under MRE 803(1) to admit testimony that the victim was "upset" after driving from a meeting with a "fellow drug dealer" to the home of a friend. Although the Court of Appeals acknowledged that it is "not overly literal" in construing MRE 803(1)'s "immediately thereafter" requirement, and that a statement may qualify under this phrase even when made several minutes after the observed event, the Court found that the statement "was not made merely a few minutes after the conversation . . . but following a drive of an indeterminate length from one house to another, and then in a separate conversation with someone not present during the first conversation." *Id*. at ___. To conclude that this was a "present sense impression," the Court stated, would be to "rob the phrase of its meaning . . . ." Stating that it "will not interpret the language of this evidentiary rule in a sense so contrary to its 'fair and natural import,'" the Court found no abuse of discretion by the trial court in declining to admit such an account. *Id*. at ___.

C. Excited Utterance Exception—MRE 803(2)

Insert the following language at the end of Section 7.4(C):

> In *People v Bowman*, ___ Mich App ___ (2002), the Court of Appeals found that testimony showing that the victim was "upset" after driving from a meeting with a "fellow drug dealer" was properly held inadmissible as an excited utterance under MRE 803(2). The Court stated that "a disagreement, even a heated or upsetting one, between drug dealers simply cannot be regarded a 'startling' event." *Id*. at ___. The Court also held that the time between the event and statement gave the victim enough "time to contrive and misrepresent before making the statement," and that the victim's then-existing emotional state did not exclude the possibility of such fabrication. *Id.*

CHAPTER 9

Post-Conviction and Sentencing Matters

9.4 Sentencing Hearing

A. Defendant's Right to Counsel

2. At Sentencing

Insert the following language at the end of Section 9.4(A)(2):

> A valid waiver of counsel at trial does not necessarily constitute a waiver of counsel at the time of sentencing. In *People v Russell*, ___ Mich App ___ (2002), the trial court permitted defendant's first appointed counsel to withdraw after defendant complained of his representation. Afterward, the trial court appointed another attorney. On the first day of trial, the defendant, because of an expressed dissatisfaction with appointed counsel, and also because of an alleged "personality conflict," requested appointment of substitute counsel, which was denied by the trial court. Defendant thereafter repeatedly rejected representation by his court-appointed counsel but said he wanted to be represented by counsel. After being thoroughly advised of the risks of self-representation, the trial court concluded that defendant had knowingly, intelligently, and voluntarily waived his right to representation. At sentencing, the trial court did not advise defendant "of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent)," as required under MCR 6.005(E).
>
> On appeal, defendant argued that the trial court erred when it failed at sentencing to comply with the requirements of MCR 6.005(E). He also alleged prejudice, claiming he wanted counsel at sentencing and that he did not validly waive counsel. Finally, he alleged that his sentence might have been less severe if he was represented by counsel. The Court of Appeals held that by failing to comply with MCR 6.005(E) the trial court committed reversible error, and so the case was remanded for appointment of counsel (if desired by defendant), and resentencing. In support of its decision, the Court stated:
>
> > "Although the record confirms that defendant's position had not changed in that he wanted to be represented by counsel but was willing to accept

> [his second] court-appointed counsel, the premise of a valid waiver of counsel at trial may no longer have existed at the time of sentencing two months after the trial. Defendant's waiver of counsel at trial was premised on the trial court's proper denial of defendant's motion for substitute counsel, and thereafter, defendant knowingly, intelligently and voluntarily chose to proceed pro se rather than accept court-appointed counsel. At the time of sentencing, however, the continued vitality of that premise, that defendant was not entitled to appointment of substitute counsel, was questionable. While the record at trial supported the conclusion that [the second counsel] was ready, able and willing to effectively represent defendant at trial, the record at sentencing indicates it might have been an abuse of discretion for the trial court to have denied a request for substitute counsel had it been made." *Id*. at ___.

The Court found that such a complete denial of counsel at a critical stage of a criminal proceeding is "structural error rendering unreliable the result and requiring automatic reversal." *Id*. at ___. Additionally, it found that "the failure to comply with MCR 6.005(E) denied defendant the substantial right of being offered appointed counsel and that this trial error seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* Finally, the Court held that since the speedy trial clock had stopped ticking, and defendant was incarcerated pending sentence on two drug charges requiring consecutive sentences of up to life, the trial court should have adjourned defendant's sentencing hearing: "Delaying defendant's sentencing for a week or two to facilitate appointment of substitute counsel would not have been an undue burden to the criminal justice system." *Id*.

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.6 Concurrent Criminal and Civil Proceedings

B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

Substitute the following language in place of the last paragraph on p 504 and the first paragraph on p 505:

> The Michigan Supreme Court has held that the holding in *Wheelock v Eyl*, 393 Mich 74, 79 (1974), did not survive the adoption of the Rules of Evidence, and thus admission of evidence of a criminal conviction in a subsequent civil suit is governed by the Rules of Evidence, specifically MRE 401-403.
>
> In *Waknin v Chamberlain*, ___ Mich ___ (2002), the plaintiff brought a civil action against defendant for assault and battery. This action was based in part on a series of assaults that allegedly occurred in July 1995, and in part on an assault and battery that allegedly occurred on May 6, 1996. This last alleged assault formed the basis of defendant's previous conviction for assault and battery. In the civil suit, defendant moved to exclude evidence of his prior conviction. The trial court, relying on the holding in *Wheelock*, *supra*, which provides that "a criminal conviction after trial, or plea, or payment of a fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence," granted defendant's motion to exclude the evidence of his prior conviction. After the jury returned a verdict of no cause of action, the trial court denied plaintiff's motion for a new trial, concluding that evidence of the conviction was inadmissible not only under *Wheelock* but also under MRE 403 since the admission of such a conviction would have been more prejudicial than probative. The Court of Appeals, relying on MRE 403, affirmed.
>
> The Supreme Court began by noting that *Wheelock* was decided before the adoption of the Michigan Rules of Evidence. The Supreme Court concluded "that the rule in *Wheelock*, at least as it pertains to the use of a conviction in a subsequent civil case, did not survive their adoption." *Id.* at ___. After reviewing the applicable rules of evidence regarding relevancy, probative value, and prejudicial effect, the Court found that defendant's conviction was relevant under MRE 401 since "the fact that defendant had been convicted of assault and battery for the same conduct that plaintiff is now seeking civil damages for certainly 'would have a tendency to make the existence of any fact that is of consequence

. . . more probable or less probable than it would be without the evidence.'" *Id*. at ___. Further, the Supreme Court found that the probative value of the conviction under MRE 403 was not substantially outweighed by the danger of unfair prejudice. In doing so, the Supreme Court, with an emphasis on MRE 403's requirement of "*unfair* prejudice," held as follows:

> "Although we agree with the lower courts that the admission of defendant's conviction would be prejudicial, we do not agree that this prejudicial effect would be *unfair.*
>
> "Defendant's conviction is not merely marginally probative evidence, and thus there is no danger that marginally probative evidence will be given undue weight by the jury. Rather, that defendant was found guilty beyond a reasonable doubt—a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case—is highly probative evidence. Where a civil case arises from the same incident that resulted in a criminal conviction, the admission of evidence of the criminal conviction during the civil case is prejudicial for precisely the same reason it is probative. That fact does not, without more, render admission of evidence of a criminal conviction *unfair,* i.e., substantially more prejudicial than probative. Defendant had an opportunity and an incentive to defend himself in the criminal proceeding. For these reasons, we conclude that the trial court abused its discretion in precluding evidence of defendant's conviction on the basis that its probative value was substantially outweighed by the danger of unfair prejudice." *Id.* at ___. [Emphasis in original.]

Regarding the issue of whether no contest pleas should be treated similarly, the Court stated: "We express no opinion regarding whether pleas of nolo contendre are admissible as substantive evidence in subsequent civil proceedings." *Id*.

CHAPTER 11

Sex Offender Identification and Profiling Systems

11.2 Sex Offenders Registration Act

L. Pertinent Case Law Challenging Registration Act

Insert the following sub-subsection and case summary after sub-subsection 8 on p 531:

9. Failure to Register and Mens Rea Requirement

A violation of MCL 28.729 for a "willful" failure to register or notify a law enforcement agency of an address change within ten days of the change is not a specific intent crime. Instead, the crime requires proof of something less than specific intent, i.e., proof of a "knowing exercise of choice." In *People v Lockett*, ___ Mich App ___ (2002), the defendant notified his Department of Corrections probation officer of his address change but failed to notify the local law enforcement agency. At the conclusion of defendant's preliminary examination, the district court dismissed the charge, concluding that defendant had not acted "willfully" by failing to notify the local law enforcement agency of his address change, even though the probation officer testified to specifically telling each of his probationers that address change updates must be made at the police station, not the probation office. The circuit court affirmed. After acknowledging that the issue of whether an omission can constitute "willfulness" is "an extremely murky area," the Court of Appeals held first that defendant's notification to his probation officer was insufficient to constitute notification to a "local law enforcement agency" under SORA. Next, the Court held that although it agreed with the district court's conclusion that the term "willfully" under MCL 28.729 "requires something less than specific intent, [and] requires a knowing exercise of choice," it disagreed with the district court's conclusion that there was "no evidence" to support a finding of "willfulness." The Court specifically found that the probation officer's testimony was "sufficient to establish probable cause to believe that defendant knew he was required to update his address with the police department whenever he moved and that he purposely failed to do so." *Id*. at ___. Thus, the Court remanded the case to the district court with instructions to bind defendant over for trial in circuit court.